STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANGELO JOHNSON, Defendant-Appellant.	FOR PUBLICATION June 14, 2011 9:00 a.m. No. 295664 Wayne Circuit Court LC No. 09-011104-01 Advance Sheets Version

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

A jury convicted Angelo Johnson of possession with intent to deliver less than five kilograms of marijuana[1] and possessing a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced him to a prison term of five months to four years for the possession-of-marijuana conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Johnson's convictions arise from a police raid at a house in Detroit. On April 8, 2008, the police executed a search warrant at 9577 Winthrop. When the police officers entered through the front door, they observed Johnson sitting on a couch in the front room. There was suspected marijuana on the table in front of him. The parties stipulated that Officer Booker Tooles confiscated, from the table in front of Johnson, one small plastic bag containing 5 vials of marijuana and 21 ziplock bags of marijuana totaling 55.9 grams. The officer in charge, Sergeant Marcellus Ball, confiscated $256, which he thought was on the "dining room table next to the marijuana . . . ."

Officer Wade Rayford confiscated two rifles (a Mossberg .22 caliber bolt-action rifle and a Marlin .35 caliber lever-action rifle) from the "front room of that location," which is the first room when a person enters the house. He could not remember if the room was actually the

[1] MCL 333.7401(1) and (2)(d)(*iii*).

[2] MCL 750.227b.

dining room or the living room, explaining, "I don't know if it was a dining room that had the appearance of a living room or vice versa." Officer Rayford clarified that he was "not saying that [Johnson] was sitting next to the guns . . . ." He believed that the weapons were recovered from "[approximately the] northwest corner of that room." Officer Brian Johnson, the first officer to enter, did not see Angelo Johnson in physical possession of a rifle, nor did Sergeant Ball personally see Angelo Johnson in possession of the rifles.

No latent prints of comparison value were developed from the rifles. Johnson gave a statement in which he admitted having one ounce of marijuana in his possession and that he had been selling marijuana from 9577 Winthrop for one month. He stated that he was not going to answer any questions about "the weapon."

The jury convicted Johnson, as stated earlier in this opinion. Johnson now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Johnson first argues that the evidence was insufficient to support his felony-firearm conviction because the evidence failed to show that he had actual or constructive possession of the firearms. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.[3]

B. LEGAL STANDARDS

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony."[4] One must carry or possess the firearm when committing or attempting to commit a felony.[5] Possession of a firearm can be actual or constructive, joint or exclusive.[6] "[A] person has constructive possession if there is proximity to the article together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant."[7] Possession can be proved by circumstantial or direct evidence and is a factual question for the trier of fact.[8]

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[3] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[4] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

[5] *People v Burgenmeyer*, 461 Mich 431, 436-437; 606 NW2d 645 (2000).

[6] *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

[7] *Id*. at 470-471 (citation omitted).

[8] *Id*. at 469.

C. APPLYING THE LEGAL STANDARDS

The evidence indicated that police seized the rifles from the corner of the front room of the house, in the vicinity of where Johnson was seated behind the table that contained marijuana. Johnson admitted that he had been selling marijuana from the house for a month. He contends that there was no evidence that the weapons were in plain sight and no proof that they were his. However, the sizes of the rifles and the testimony describing their location in the corner of the front room, coupled with the fact that Johnson had admittedly been selling drugs from the house for a month, were sufficient to enable the jury to rationally find that he was aware of the rifles and that they were reasonably accessible to him. Thus, there was sufficient evidence that Johnson constructively possessed the rifles to support his felony-firearm conviction.

III. SCORING OF PRV 6

A. STANDARD OF REVIEW

Johnson argues that resentencing is required because the trial court erroneously assessed five points for prior record variable (PRV) 6 of the sentencing guidelines. "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[9] "A trial court's scoring decision for which there is any evidence in support will be upheld."[10] To the extent that a scoring challenge involves a question of statutory interpretation, this Court reviews the issue de novo.[11]

B. LEGAL STANDARDS

PRV 6 considers an offender's relationship to the criminal justice system.[12] A trial court should assess five points when "[t]he offender is on probation or delayed sentence status or *on bond* awaiting adjudication or sentencing for a misdemeanor[.]"[13]

C. APPLYING THE LEGAL STANDARDS

Johnson acknowledges that before committing the sentencing offense in April 2008, he had been charged with a misdemeanor for which he had been granted bond. However, it is undisputed that he forfeited his bond in July 2007, before he committed the sentencing offense.

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[9] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (quotation marks and citation omitted).

[10] *Id*. (quotation marks and citation omitted).

[11] *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

[12] MCL 777.56.

[13] MCL 777.56(1)(d) (emphasis added).

Therefore, Johnson argues that he was not "on bond" when he committed the sentencing offense and that the trial court should not have assessed five points for PRV 6.[14]

Under PRV 6, the trial court assesses points on the basis of the defendant's relationship to the criminal justice system when he or she committed the sentencing offense:[15]

> Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor.....5 points
>
> (e) The offender has no relationship to the criminal justice system ..... 0 points[16]

The principles of statutory interpretation apply to the interpretation of the sentencing guidelines to determine if the term "on bond" includes those defendants whose bonds have been revoked.

> [T]he primary goal of statutory construction is to give effect to the Legislature's intent. To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed.[17]

In interpreting the language of PRV 6, this Court has previously affirmed a trial court's assessment of five points for an individual who did not fit squarely within the language of the statute. In *People v Endres*, the offender's circumstances did not fit the criteria in the statute, but this Court determined that there was no plain error in assessing five points for PRV 6, explaining:

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[14] The record indicates that Johnson was arrested for another misdemeanor offense in December 2006, but he apparently was not arraigned on that offense until April 2009, after the sentencing offense was committed. The prosecution does not contend that the scoring of PRV 6 may be upheld on the basis of Johnson's status with respect to that offense.

[15] *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007).

[16] MCL 777.56(1).

[17] *Osantowski*, 481 Mich at 107 (quotation marks and citations omitted) (alteration in *Osantowski*).

> [D]efendant correctly argues that he was not on probation at the time that the present offenses were committed. The record indicates that his probation for a 1999 retail fraud juvenile adjudication was completed before the offense dates of June 1, 2001, to July 27, 2001. However, the record also indicates that on May 12, 2001, defendant was charged with purchasing, consuming, or possessing alcohol as a minor, to which he pleaded guilty on June 18, 2001, and was sentenced to pay $85 in fines, costs, and fees. Therefore, defendant had a relationship with the criminal justice system at the time he committed the offenses in the present case, and no plain error is apparent in the trial court's assessment of five points for PRV 6.[18]

In essence, this Court determined that there was sufficient evidence to show that the defendant had a relationship with the criminal justice system. This Court determined that the evidence was sufficient despite its not falling precisely within the statutory criteria.

In addition, this Court considered PRV 6 under the former judicial sentencing guidelines in a case involving an offender whose bond was revoked before he committed the sentencing offense. Under the former judicial sentencing guidelines, a court had to assess 15 points for PRV 6 if a "[p]ost-conviction relationship exists or the offender committed the instant offense within six months of termination of probation or parole[.]"[19] The court had to assess five points when "[an]other relationship exist[ed]," and the court had to assess zero points when "[n]o relationship exist[ed]."[20] The instructions stated that a "post-conviction relationship" existed if, "at the time of the instant offense," the offender was incarcerated, on parole or probation, awaiting sentence (including on a probation violation), or on delayed sentence status.[21] The instructions further stated that "[an]other relationship exist[ed] if, at the time of the instant offense," the offender was "on bond and/or bail[.]"[22] In *People v Lyons*, before committing the sentencing offense, the defendant was arrested and posted bond. When he did not show up at the hearing, his bond was revoked.[23] This Court concluded that five points were properly assessed for PRV 6. This Court held that a revoked bond did not fit a label of "no relationship" with the criminal justice system:

> Under these circumstances, at the time of this offense, defendant had a prior relationship with the criminal justice system. In addition, the guidelines do not state that five points can be assessed *only* in the enumerated circumstances. The sentencing guidelines are interpreted in accordance with the rules of statutory construction. The primary rule of statutory construction is to ascertain the intent

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[18] *People v Endres*, 269 Mich App 414, 422-423; 711 NW2d 398 (2006).

[19] Michigan Sentencing Guidelines (2d ed), p 97.

[20] *Id*.

[21] *Id.*

[22] *Id.*

[23] *People v Lyons (After Remand)*, 222 Mich App 319, 322; 564 NW2d 114 (1997).

> of the drafters. Statutes must be construed to prevent absurd or illogical results and to give effect to their purposes. It would be absurd to suggest that the drafters of the guidelines intended that a defendant would receive more lenient treatment by being, in the words of the trial court, a "runaway" from the criminal justice system. The trial court did not err in assessing defendant five points for PRV 6.[24]

Endres suggests that a five-point score for PRV 6 is not improper when the defendant committed the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his or her bond status. The case illustrates this Court's refusal to categorize a defendant as having no relationship with the criminal justice system when it is obvious that such a relationship exists.

Moreover, although merely persuasive, *Lyons* is also useful to our current analysis because it illustrates that this Court has held that a defendant had a relationship with the criminal justice system despite not being "on bond."

In this case, in spite of his not being technically on bond, the trial court chose to assess five points for PRV 6 rather than classify Johnson as having no relationship to the criminal justice system. Johnson clearly had a relationship with the criminal justice system, and the trial court did not see it fit to categorize him otherwise.

Admittedly, when an offender commits an offense after his or her bond has been forfeited or revoked, the offender is not "on bond," as PRV 6 states. However, when an offender's bond is revoked, he or she is also not free and clear of the criminal justice system. A condition of any pretrial release (bond) is that the defendant will appear in court as required.[25] We note that even if a defendant's bond is forfeited, the condition that the defendant appear in court is still in place and is an inherent condition of any pretrial release. Forfeiting the monetary part of a bond does not relieve the defendant of the obligation to comply with the condition that he or she appear as required by the court.

A court does not have discretion when scoring PRV 6.[26] As such, the trial court had to decide whether to score PRV 6 at five points, in spite of Johnson's revoked bond, or to score the variable at zero points. Zero points are assessed when a defendant has *no* relationship to the criminal justice system.[27] This clearly is not the case with Johnson. He was granted bond, which was subsequently revoked for his failure to pay. The ramifications of the underlying misdemeanor do not dissipate simply because his bond was revoked. If anything, the urgency of

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[24] *Id.* at 322-323 (citations omitted).

[25] See MCR 6.106(C) and MCR 6.106(D).

[26] MCL 777.56(1) does not use discretionary language. It states to "score" PRV 6 by "assigning" a number of points.

[27] MCL 777.56(1)(e).

the matter was compounded when a warrant was issued thereafter. To say that Johnson had no relationship to the criminal justice system would be to ignore the reality of his previous conduct. The continued existence of the prior misdemeanor charge created a relationship with the criminal justice system that survived the revoked bond.

In summary, we find no error in the lower court's scoring PRV 6 at five points. Johnson was charged with a misdemeanor for which he was granted bond. That bond was subsequently revoked, but the ramifications of the charge remained. When Johnson committed the sentencing offense, the misdemeanor charge was still pending. As such, this Court cannot classify Johnson as having had "no relationship" with the criminal justice system. Accordingly, the trial court did not misscore PRV 6 at five points.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Johnson argues that defense counsel's failure to object to the scoring of the guidelines constituted ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."[28] "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[29] This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations.[30] This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record.[31]

B. LEGAL STANDARDS

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[32] To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed the defendant by the Sixth Amendment."[33]

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[28] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[29] *Id.*

[30] *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[31] *Id.*

[32] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[33] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. APPLYING THE LEGAL STANDARDS

As stated, the trial court assessed five points for PRV 6. Again, a trial court is to assess five points for "[an] offender [who] is . . . on bond awaiting adjudication or sentencing for a misdemeanor[.]"[34] Because Johnson's bond had been revoked, he argues that he was no longer "on bond" at the time the sentencing offense was committed and thus should have had zero points assessed. Therefore, he contends that defense counsel was ineffective for failing to object to the PRV 6 scoring.

Defense counsel's decision to not object to the scoring may have been trial strategy. A trial court may assess 15 points under PRV 6 if "[t]he offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation[.]"[35] When Johnson's bond was revoked, a warrant was issued for his arrest. It can be argued that he should have been in jail when he committed the sentencing offense and therefore should have had 15 points assessed, rather than five points. Johnson's total PRV score was 25 points, which placed him at prior record variable level D (25-49 points) on the sentencing grid. If the trial court had assessed zero points for PRV 6, he would have shifted to PRV level C (10-24 points). If the trial court had assessed 15 points, he would have remained at PRV level D. The PRV level C recommended minimum sentence range for someone like Johnson, who commits a crime in offense class F and is at offense variable level II is between zero and 17 months, while the minimum sentence range with PRV level D is 5 to 23 months.[36] But a higher point total within the point range for PRV level D might have resulted in a longer minimum sentence within the minimum sentence range specified for PRV level D.

Defense counsel may have thought that aiming for a shorter minimum sentence within the range for PRV level D constituted a better strategy than challenging the score in hopes of falling within the range for PRV level C but with a risk of a higher sentence under PRV level D if that challenge failed. Put differently, if defense counsel objected and was awarded a review of the scoring, there is a chance that Johnson might have wound up in PRV level C, but there is also a chance that his score would have risen to a higher number under PRV level D. There is a strong presumption that defense counsel's actions represented sound trial strategy, and because there is a basis for defense counsel's not objecting to the PRV 6 score, Johnson cannot overcome that presumption. Furthermore, because sentence ranges for PRV level C and level D partially overlap, it is possible that sentencing could have been the same regardless of whether he was within PRV level C or level D. Johnson cannot prove that, but for counsel's errors, the proceedings would have turned out differently. Because Johnson has not met his burden, his claim of ineffective assistance of counsel fails.

We affirm.

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[34] MCL 777.56(1)(d).

[35] MCL 777.56(1)(b).

[36] MCL 777.67.

/s/ William C. Whitbeck
/s/ Peter D. O’ Connell